85-751

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MOTION PICTURE LABORATORY TECHNICIANS AND FILM AND TAPE EDITORS LOCAL 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, on its own behalf and on behalf of the affected individuals it represents,

Petitioner,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, ITS ADMINISTRATOR, STUART J. EVANS, ITS DIRECTOR OF PROCUREMENT, and ROBERT KING, ITS DIRECTOR OF LABOR RELATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHEN CONGRESS HAS ENACTED LEGISLATION, AND THE OFFICE OF MANAGEMENT AND BUDGET HAS IMPLEMENTED THE LAW BY ISSUING DIRECTIVES, TO PROHIBIT CERTAIN EXCESSES BY AGENCIES OF THE EXECUTIVE BRANCH OF THE FEDERAL GOVERNMENT, TO ENCOURAGE THE USE OF THE PRIVATE SECTOR AND TO SUPPORT THE CONTINUING DEVELOPMENT OF A COMPETENT PROFESSIONAL WORK FORCE, DOES NOT A GROUP OF INCUMBENT COMPETENT, PROFESSIONAL PRIVATE SECTOR EMPLOYEES (AND THE UNION WHICH REPRESENTS THEM), WHOSE JOBS WERE ELIMINATED WHILE THE AGENCY CREATED NEW INTERNAL POSITIONS REQUIRING THE HIRING OF NEW EMPLOYEES, HAVE STANDING TO FILE A COMPLAINT WHEN THE AGENCY FAILED TO CONDUCT THE COST COMPARISON STUDY WHICH IS MANDATED PRIOR TO MAKING SUCH A REPLACEMENT DECISION?

PARTIES

The caption of the case in this Court contains the names of all parties.

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MOTION PICTURE LABORATORY TECHNICIANS AND FILM AND TAPE EDITORS LOCAL 780 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, AFL-CIO, on its own behalf and on behalf of the affected individuals it represents,

Petitioner,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, JAMES M. BEGGS, ITS ADMINISTRATOR, STUART J. EVANS, ITS DIRECTOR OF PROCUREMENT, and ROBERT KING, ITS DIRECTOR OF LABOR RELATIONS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

Petitioner Motion Picture Laboratory Technicians and Film and Tape Editors Local 780 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO on behalf of the affected individuals it represents respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The unpublished order of the Court of Appeals had attached to it the memorandum opinion and order of Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois. The decisions appear at App 1-10.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 1, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The matter involving the Office of Federal Procurement Policy Act, 41 U.S.C. § 401, *et seq.*, as amended, was originally brought before the district court pursuant to 28 U.S.C. § 1331 and 1361 and pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701, 702, 704, and 706.

STATUTES AND DIRECTIVE INVOLVED

The statutes involved herein are the Office of Federal Procurement Policy Act, 41 U.S.C. §§ 401 and 405, ("OFPP") (App 11a-16a) and the Administrative Procedure Act, 5 U.S.C. §§ 701, 702, 704 and 706 ("APA") (App 16a-19a). Also involved herein is the "OFFICE OF MANAGEMENT AND BUDGET'S (OMB) CIRCULAR NO. A-76, POLICIES FOR ACQUIRING COMMERCIAL OR INDUSTRIAL PRODUCTS OR SERVICES NEEDED BY THE GOVERNMENT" ("Circular No. A-76") (App 20a-41a).

STATEMENT OF THE CASE

Petitioner represents a professional work force of private sector employees who lost their jobs by reason of the National Aeronautics and Space Administration ("NASA") and certain of its officers' failure to fulfill the mandate imposed upon said Defendants by Congress and the Office of Management and

Budget ("OMB"). In 1974, Congress enacted the OFPP because of the breakdowns in the voluntary coordination between the OMB and agencies of the Executive branch of our government relative to the "procurement of property and services" by these agencies.[1] Congress identified thirteen specific areas of concern. One of the stated concerns was "supporting the continuing development of a competent, professional work force."[2] Recognizing congressional intent, the OMB readopted its Circular No. A-76.[3]

Circular No. A-76 was designed to favor private industry in the government's procurement of goods and services. Thus, to take work which had been previously awarded by a federal Executive agency to a private sector employer from the private sector and to place it in the public sector, as happened here, the law mandated that there be an elaborate cost survey prior to any removal of work from the private sector. No work was to be removed from the private sector and moved into the public sector, or taken from the public sector and placed in the private sector, for that matter either, without the required cost comparison study. The purpose of these studies was to benefit government by minimizing costs to the furthest possible extent,[4] to benefit and encourage the growth of private sector employers and employees by creating employment opportunities and to support the continuing development of a competent, professional work force. In regard to the particular Executive agency involved, the study and evaluation was to provide OMB mandated cost analysis figures which the agency could then feed into its own particular needs using its own particular expertise. Once the cost comparison study was completed and

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[1] 41 U.S.C. § 401 (App. 11a-12a).

[2] 41 U.S.C. § 401(5) (App. 11a).

[3] Senate Report 98-214, pg. 2 (Committee on Governmental Affairs). Defendant NASA on September 13, 1982, issued Management Instruction 7410-3c specifically adopting Circular No. A-76.

[4] There are only two specific and limited instances when a cost comparison is not required. The exceptions, not relevant here, are where there are no satisfactory commercial sources available and national defense (Circular No. A-76, §§ 8a and b, App. 29a-32a).

made public, discretion was vested in the agency with respect to its application, with an aggrieved having the right only to an internal appeal, the thinking apparently being that the facts reflected in the study would minimize or avoid an abuse of discretion. Here, no study was made. The Defendants did *not* deny that no such study was made prior to the removal of the work. Rather, they merely contended that the Circular "does not create any actionable procedural or substantive right in any person to challenge agency action based on the agency's failure to act in accordance with the provisions of the Circular."[5]

With the removal of the work from the private sector, the individual employees lost their jobs and new government employees were hired to perform the identical work.

The Decisions Below

The district court dismissed the complaint because, in his mind, the employees lacked standing, *i.e.*, they did not fall within the "zone of interest." The district court acknowledged that Circular No. A-76 was designed to favor private industry in the procurement of goods and services. The court found that the private contractor fell "'squarely within the' zone of interest."[6] He did not apply the standard of whether or not one was arguably within the "zone of interest." Rather, he expressed the test as being one of "immediacy of interest." Stating that the interest of the employees were "peripheral" (App 9a) and that the employees affected would "likely (though not necessarily) benefit from the reassignment of work to the private sector," the court required that the interest of the employees be identical to the interest of their employer and stated that they were not.[7] This despite the fact that if the law had been followed, the private sector employer would have *retained* (not been reassigned) the work until at least the completion of a cost comparison (and no doubt thereafter

[5] Defendants' Memorandum in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment, pg. 3.

[6] App. 7a.

[7] App. 8a.

based upon our knowledge of the costs) and the terminated employees would have *continued to work* for the same employer. Thus, private sector employers were indeed (*i.e.*, "squarely") within the zone of interest but his private sector employees were not—according to the district court.

In essentially a one paragraph order, the Appellate Court merely adopted the " 'squarely within the "zone of interest" of the circular' " test and affirmed the dismissal of the complaint.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decisions of the court below are in **direct** conflict with this Court's decisions on the "zone of interests" and standing. As this Court well knows, the seminal cases of the zone of interests test are the companion ones of *Barlow v. Collins*, 397 U.S. 159 (1970), and *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). *Camp* specifically rejected the previously accepted "legal interest" test of standing because it went to the merits of the case. "The question of standing is different. It concerns, apart from the 'case' or 'controversy' test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute . . . in question." (pg. 153) (Emphasis supplied). This, then, is this Court's definition of standing and the zone of interests. The Court did not and has not created the " 'squarely' within the 'zone of interest' " test applied to the instant complaint by the district court and affirmed by the Seventh Circuit (App 2a, 7a). Similarly, this Court, contrary to the courts below, did not and has not created the "immediacy of interest" test nor has this Court required that one party's interest (*i.e.*, incumbent employees) be identical to another party's interest (*i.e.*, their employer).[8] And this is without even

[8] Interestingly, this Court utilizes the phrase in the plural-zone of interests and, of course, it was obviously so intended for a zone may well have more than one narrow, diminutive interest.

reaching the fact that the private sector employees of their private sector employer found to be "squarely" within the zone of interest, indeed had interests identical to their employer. He lost the work; they lost their jobs.

Camp then stands for the principle of inquiring only into whether or not one is arguably within the zone of interests. Clearly, the case was not intended to establish a mechanical test, nor was it designed to invite pedantic exercises. The test was labeled "prudential." So intent was the Supreme Court in not precluding judicial review that, in the midst of its discussion of "zone of interest," it pointed out that the APA "grants standing to a person 'aggrieved' by agency action within the meaning of a relevant statute." *Camp,* 397 U.S. 150, 153 (1970). There, zone of interests were to be examined but obviously not to be interpreted as a vice like deprivation of the utilization of the courts. Hence, *Camp* (at pg. 156) limited the examination to whether or not one was "arguably" within the zone of interests protected or regulated and even beyond that cautioned against "implicat(ing) the merits" lest such an inquiry at that early stage, might tend to deprive a plaintiff of the right to have his case heard.

Additionally, the Seventh Circuit has turned its back on such decisions as *Cotovsky-Kaplan Physical Therapy Assoc., Ltd. v. U.S.,* 507 F.2d 1363 (C.A. 7, 1975), wherein now Justice Stevens, wrote a decision which recognized that "protected" even if different from "regulated" interests, under *Camp,* were nevertheless within the zone of interests. The facts in *Cotovsky* were that the plaintiff, a proprietary physical therapy service agency, challenged federal regulations which prohibited home health agencies from contracting out physical therapy service to a propriety organization. Justice Stevens wrote that plaintiff had standing "(s)ince the 'zone of interests' test merely requires that plaintiffs' interests in contracting with nonprofit home health agencies be 'arguably' within the regulated zone under the statute, the standard is easily met in this (*Cotovsky*) case." (pg. 1365). Continuing, *Cotovsky* recited that "Defendants respond and the district court concluded, however, that the regulation purported to regulate only home health agencies and

that it does not regulate plaintiffs or their contracts. To focus on whether the plaintiffs are directly regulated themselves is to read the *Data Processing* test too narrowly and conflicts this Court's standard. The test is not whether these plaintiffs are regulated by the statute but whether the interests asserted by them arguably fall within the zone of interests so regulated." (pg. 1366).[9]

Contrary to the test enunciated by the courts in dismissing the instant case, the standards set forth in *Camp, Cotovsky* and *CBS* recognize that Plaintiff is arguably within the zone of interests. The OFPP's Congressional declaration of policy includes "supporting the continuing development of a competent, professional work force." The individuals represented by Plaintiff are the competent, professional work force. Without the making of the mandated Circular No. A-76 cost comparison study prior to the taking of the work out of the private sector and its placement in the public sector, the congressional policy of promoting economy, efficiency and effectiveness in the procurement of services by the Executive branch of the federal government is subverted and destroyed. The fact that the incumbents' employer is, in the lower courts' words, "squarely" within the zone of interests at issue herein leaves the employees arguably within that zone of interests. As the lower courts acknowledge, the Circular has the stated preference of favoring the private sector in the procurement of

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[9] The *Cotovsky* court, in its analysis of *Camp*, also considered this Court's decision in *Columbia Broadcasting System, Inc. v. U.S.*, 316 U.S. 407 (1942), wherein Columbia Broadcasting System, Inc. ("CBS") brought an action to set aside a federal agency regulation which affected its (CBS's) relationship with its affiliated radio stations. This Court found that CBS had standing although the contested regulations were not directed to CBS and did not compel action or impose penalties upon CBS. The Court found that "(i)t is enough that, by setting the controlling standards for the Commission's action, *the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners* whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked (citations omitted)." *CBS*, 316 U.S. 407, 422 (*Emphasis supplied*). See, *Colonial Penn Insurance Company v. Heckler*, 721 F.2d 431 (C.A. 3, 1983), fn. 23, *supra*, which relies upon *Cotovsky* and *CBS*, as well as *Camp*.

federal services. Obviously, private sector employees of a private employer, actually performing services for the federal government are asserting their own rights which are arguably protected within the statutory scheme of the OFPP/Circular and, therefore, are arguably within the zone of interests.

In addition to the zone of interests test for standing which supports the instant complaint, the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, provides for judicial review of agency action or inaction for "(a) person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." [10] The basic presumption of judicial review of agency action is codified in the APA. Here, there is no "clear statutory command" prohibiting review and no "congressional intent to preclude judicial review . . . shown by the overall purpose or design of the relevant statute as viewed within the context of the entire legislative scheme." *Abbott Laboratories v. Gardner,* 387 U.S. 136, 141 (1966). As this Court observed in *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 157 (1970), there is a presumption in favor of judical review "unless a contrary purpose is fairly discernible in the statutory scheme." This case is reviewable for these reasons and because the manner in which the Defendants reached their decision was ". . . in contravention of the legal restrictions contained in (their) governing regulations." *Scanwell Laboratories, Inc. v. Schaeffer,* 424 F.2d 859, 874 (CA.D.C., 1970). In *Scanwell* the court observed that "contracting officials can exercise discretion upon a broad range of issues confronting them; they may not, however, opt to act illegally. When the bounds of discretion give way to stricter boundaries of law, administrative discretion gives way to judicial review." *Ibid.*

Circular No. A-76 contains no statement which prohibits the bringing of a cause of action for an agency's failure to make the comparison prior to its decision awarding the particular

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[10] 5 U.S.C. § 702 (App. 17a-18a). See also OFPP, 41 U.S.C. § 405(a) and (c) (App. 12a, 13a).

work. Indeed, the legislative history of the original Section 6(a) of the OFPP, 41 U.S.C. § 405(a), its enabling statute, states that (the policies and regulations prescribed by the Administrator of the OFPP) will have the same legal force and effect as the statute and any violation would be subject to judicial challenge and review." [11] Circular No. A-76 specifically provides, in a paragraph entitled the *"Responsibility (of the Agency),"* that each agency head has the responsibility to ensure that the provisions of the Circular are followed.[12] In contrast to the requirement of making the cost comparison, the Circular includes a statement of limitation or exclusion on bringing a court complaint *once the agency has made its cost comparison study and made its discretionary decision based on its study.*[13]

Allegations in the complaint of "(1) a bona fide injury which, however small, negates all implications that the Plaintiff filed the lawsuit from intellectual or academic curiosity, (citations omitted) and (2) 'a fairly traceable' causal connection between the Plaintiff's alledged injuries and the defendant's illegal conduct, established that the plaintiff has suffered injury at the hands of the defendant and confirms that he holds the requisite personal stake to prosecute the lawsuit. Otherwise judicial intervention could be a fruitless, gratuitous endeavor." *Duke Power Co. v. Carolina Environmental Study Group,* 438 U.S. 59, 72 (1978). Here, the employees' lost jobs are not intellectual or academic curiosities. Their interests are real. Their interests are actual. The loss of their jobs is not just fairly traceable, but a direct result of Defendants' illegal conduct in removing the work from the private sector without first having made the required Circular A-76 cost comparison. Plaintiff's investigation demonstrates that a cost comparison will reveal that it is substantially cheaper to have the work performed by the private sector. Thus, any transfer of work to the public sector would be a clear abuse of discretion which the agency would have to justify to various oversight committees and this is

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[11] 1974 U.S. Code Cong. & Adm. News, pg. 4600.

[12] App. 24a.

[13] App. 24a and 40a-41a.

the check and balance under administrative law when discretion is vested in administrative agencies at certain stages.

The abuse of discretion, of course, is not before this Court; nor does one have to speculate even as to what might happen at subsequent stages. The Defendants had no discretion with respect to the making of a cost comparison study if it was contemplating transferring the work from the private to the public sector. The point is that the people must retain the jobs until an A-76 cost comparison is made and, accordingly, the transfer of the work and resultant termination of the employees is illegal. The Court has the power to order the reinstatement of the employees, to make them whole, and to direct the making of a cost comparison study if the awarding agency still wants to transfer the work. Clearly, Plaintiff has standing to bring this suit. Relief is available, *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 475 (1982).[14]

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[14] And, of course, a motion to dismiss for lack of standing accepts all material allegations in the complaint as true and liberally construes the document in favor of the plaintiff. *Jenkins v. McKeithen,* 395 U.S. 411, 421-422 (1969).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this petition for writ of certiorari be granted.

Respectfully submitted,

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October 28, 1985

APPENDIX

APPENDIX

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Order of the United States Court of Appeals for the Seventh Circuit (with attached Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern District)	App. 1a
Statutes	App. 11a
Directive	App. 20a

UNPUBLISHED ORDER
NOT TO BE CITED
PER CIRCUIT RULE 35

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

Argued April 25, 1985

August 1, 1985

No. 84-2341

BEFORE

HON. WALTER J. CUMMINGS, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. WILLIAM P. GRAY, District Judge*

MOTION PICTURE LABORATORY TECHNICIANS ETC., *Plaintiff-Appellant,*	Appeal from the United Stated District Court for the Northern District of Illinois, Eastern Division
VS.	
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, ET AL., *Defendants-Appellees.*	No. 83 C 6473 MILTON I. SHADUR, Judge

The appellant labor union represents "writers and micom operators" that had worked for private sector employers that

* Honorable William P. Gray, United States District Judge, Central District of California, sitting by designation.

had contracts with or were subcontractors of NASA. The latter had announced its determination to transfer the work being performed by the private contractors to in-house government employees. The appellant filed suit in United States District Court challenging such action on the ground that it was taken without first conducting a "comparative cost anaylsis," as required by Circular No. A-76, issued by the Office of Management and Budget. The District Court dismissed the action with prejudice on the ground that the plaintiff lacked standing to prosecute it. We affirm.

As the appellant points out, the "standing" test to be applied was articulated in *Data Processing Services v. Camp*, 397 U.S. 150 (1970). The question is " . . . whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The District Judge, in his memorandum opinion, expressed his awareness that the contractors that had employed the plaintiff's members were "squarely within the 'zone of interest' of the circular." He then carefully distinguished between the interests of the employers and those of the employees and concluded that the purposes of the Circular did not involve the allocation of labor opportunities. We agree with the careful analysis made by the District Judge, adopt his attached opinion as our own, and accordingly affirm the judgment of dismissal.

IN THE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 83 C 6473

MOTION PICTURE LABORATORY TECHNICIANS
AND FILM AND TAPE EDITORS
LOCAL 780 OF THE INTERNATIONAL
ALLIANCE OF THEATRICAL STAGE
EMPLOYEES AND MOVING PICTURE
MACHINE OPERATORS OF THE
UNITED STATES AND CANADA, AFL-CIO, etc.,
Plaintiffs,

v.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

Motion Picture Laboratory Technicians and Film and Tape Editors Local 780 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO ("Local 780"), for itself and on behalf of all affected individuals it represents, challenges a decision by National Aeronautics and Space Administration ("NASA") [1] to reassign work from the employers of certain Local 780 members to NASA's own in-house employees. Complaint ¶ 9 alleges NASA failed to conduct a

[1] Although NASA's Administrator James M. Beggs and two of its officials, Stuart J. Evans and Robert King, are joined as co-defendants, for convenience all three defendants are referred to collectively as "NASA."

"comparative cost analysis" as Office of Management and Budget Circular No. A-76 (the "Circular") requires in such situations.

NASA has moved to dismiss under Fed. R. Civ. P. ("Rule") 12(b)(6) or alternatively for summary judgment under Rule 56,[2] arguing its action is not reviewable by any court. Local 780 for its part has submitted a short affidavit and moved for summary judgment as well.[3] On March 14, 1984 (before those motions were fully briefed) this Court asked the parties for further submissions on Local 780's standing to sue and on reviewability issues not yet adequately covered. Now briefing on those matters is complete. For the reasons stated in this memorandum opinion and order NASA's motion to dismiss is granted.

NASA's motion to dismiss asserts the non-reviewability of its actions and now (after this Court's March 14 inquiry) Local

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[2] Rule 12(b)'s last sentence permits treatment of Rule 12(b)(6) motions as Rule 56 motions when "matters outside the pleading are presented to and not excluded by the court." NASA moves alternatively under Rule 56 because it relies on the Circular. However there is no need to invoke Rule 56, because this Court may take judicial notice of the Circular's contents under *Newcomb v. Brennan*, 558 F.2d 825, 829 (7th Cir.), *cert. denied*, 434 U.S. 968 (1977).

[3] Local 780 business manager Andrew Younger's June 1 affidavit supposedly remedies the problems this Court indicated it had with his February 21 affidavit, which purported to be simply a brief and non-specific verification of the "facts stated" in Local 780's memorandum. Though the new affidavit answers the obvious question of which statements in Local 780's memorandum Younger considers to be facts, it leaves more fundamental problems untouched:

> 1. Younger does not reflect any basis for personal knowledge of a number of the facts, such as NASA's failure to conduct a "comparative cost analysis" and its source of labor to accomplish its reassigned work.
>
> 2. In any event the affidavit cannot at this point be an adequate foundation for a summary judgment motion. Discovery has not begun and Younger has not been cross-examined. It really does some violence to the Rule 56 concept to consider that a conclusory verification of a complaint's allegations can entitle the plaintiff to summary judgment at this stage of the proceedings.

780's lack of standing to sue. This Court has concluded the latter ground is persuasive and compels dismissal of the Complaint. That renders moot Local 780's summary judgment motion (though it might well have been considered premature in any case; see n.3). It also leads this Court to decline the approach suggested in *Peoples Gas, Light & Coke Co. v. United States Postal Service*, 658 F.2d 1182, 1188-89 n.3 (7th Cir. 1981), and then followed in that case (*Id.* at 1188-92), of venturing initially into the field of reviewability.[4] Instead it will simply assume arguendo that *some* judicial review is not precluded.

Local 780's Standing To Sue

NASA lodges two standing arguments:

1. This case does not even present a justiciable controversy because Local 780's injury is not redressable by this Court. Local 780's injury will not be alleviated unless NASA reassigns the work in question to the private sector, but concededly the most this Court can do is to require NASA to conduct a "comparative cost analysis."

2. Local 780 is not within the "zone of interest" of the Circular as required by *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

NASA is only half right, but that is enough to prevail.

Its first argument need not detain us long. *Peoples Gas*, 658 F.2d at 1194 & n.9 held the requirement that a defendant

[4] *Peoples Gas*, 658 F.2d at 1189 n.3 recognizes a drawback of its approach is that it produces dicta. This Court has gone through the entire history of the Circular, the intervening statutory revisions and all the cases dealing with the problem. Suffice it to say (1) those cases really engage in little (or more often no) analysis in arriving at their conclusions that the Circular really has no legal status and (2) the whole notion of engaging in a tortuous analysis to reach a different conclusion, but one that would make no difference at all in the result here, shows why courts should strain to avoid dicta rather than to generate them. Hence the arguendo assumption stated in the next sentence of the text.

systematically reconsider an earlier decision against the plaintiff creates a sufficient likelihood the plaintiff's injury would be redressed Relief in such a situation, the court held, is not "purely speculative." Both there and here, defendant had two options and chose one unfavorable to plaintiff: in *Peoples Gas,* after following procedures the plaintiff challenged as inadequate; in this case, after failing to follow procedures the plaintiff says were essential.

But NASA's second standing contention is fatal to Local 780's claim. *Peoples Gas,* 658 F.2d at 1195 requires the purpose of the statute relied on to be ascertained from the language of the statute itself, its regulations and its legislative history. NASA probably goes too far when it argues the only purpose of the Office of Federal Procurement Policy ("OFPP") Act of 1974, of subsequent versions of that Act [5] and of the Circular, which is issued pursuant to the various OFPP Acts, is to provide efficient procurement. It is true the current OFPP Act's statement of findings and purpose, 41 U.S.C. § 402, refers only to efficiency and coordination of "procurement policies." If that is the sole extent of the interests implicated by the Circular, then of course no one but the government itself is within the "zone of interest" of the Circular. *Cf. American Federation of Government Employees v. Stetson,* 86 CCH Lab. Cas. ¶ 33,819, at 48,851 (D. D.C. 1979); *American Federation of Government Employees v. Hoffmann,* 427 F.Supp. 1048, 1083 (N.D. Ala. 1976).

But an examination of existing "procurement policies" reveals one of those policies is reliance whenever possible on the private sector. Thus original OFPP Act § 6(d)(3), Pub. L. No. 93-400 (88 Stat. 796, 798) (1974) required the OFPP Administrator to engage in activities "relating to reliance by the Federal Government on the private sector to provide needed

[5] 41 U.S.C. §§ 401-412 codifies the current version of the 1974 statute and its subsequent reenactments (collectively the "OFPP Acts").

property and services." Similarly, both the 1974[6] and the 1979[7] United States Code Congressional and Administrative News legislative histories of their respective OFPP Acts referred to the policy of reliance on the private sector. And the Circular itself is expressly aimed at promoting reliance on the private sector. Its most recent Transmittal Memorandum "reaffirms the Government's general policy of reliance on the private sector," and under Circular § 8(c) if the cost of public sector production of particular government needs is either greater than *or equal to* the cost of private sector production, those needs must be contracted to the private sector.

All that evidence places government contractors squarely within the "zone of interest" of the Circular. Congress has decided such contractors should receive government business in

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[6] Senate Committee on Government Operations' Comment on section 6(c)(1) of its 1974 proposed bill (S. 2510) cited the Circular as an example of a policy to be enforced under the OFPP Act (Sen. Rep. No. 93-692, 1974 U.S. Code Cong. & Ad. News 4589, 4600-01):

> Although there are some statutory directives, OMB Circular A-76 is the primary vehicle for establishing and implementing the national policy to rely on private enterprise for the provision of the Government's goods and services.

Section 6(c)(1) of S. 2510 was enacted as OFPP Act § 6(d)(3), 88 Stat. at 798. See Joint Conf. Rep. No. 93-1268, 1974 U.S. Code Cong. & Ad. News 4623, 4626.

[7] NASA points out Congress expressed its displeasure in 1979 over the repeated reissuance of the Circular (H.R. Rep. No. 96-178, 1979 U.S. Code Cong. & Ad. News 1492, 1495):

> OFPP's recent reissuance of OMB circular A-76, for example, totally ignored the Procurement Commission's recommendation that Federal policy on the government's reliance on the private sector should be set by Congress.

However Congress stopped short of withdrawing its authorization for the Circular (*id.* at 1501):

> After extensive discussion with OMB and GAO, the Committee amended H.R. 3763 to grant OFPP limited authority to issue policy directives in furtherance of the principal policy objectives of the Office of Federal Procurement Policy Act. This authority is to be exercised only with the concurrence of the Director of the Office of Management and Budget.

certain cases, such as when the cost to the government is equal to or less than the cost of in-house production.[8] When government business goes in-house, contractors are the paradigmatic objectors because their interest in obtaining business is identical to the congressional interest (implemented by the Circular) in delivering business to private contractors.

But the immediacy of interest of employers is not in turn identical to any immediacy of interest of employees. Local 780 and its members would likely (though not necessarily) benefit from the reassignment of the work to the private sector. That likelihood, however, is only a collateral (and really aleatory) consequence of the directly intended benefit to their employers and former employers.[9] If for example their employers, as government contractors, could do the work more cheaply but with less labor than the government could in-house, the interests of the government and the employers would be promoted by reliance on the public sector while the interests of the employees would not. Thus Local 780 does not meet the requirement of *Peoples Gas,* 658 F.2d at 1196-97 that its interests "match" that of the government.

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[8] Just because the policy of preferring the private sector may perhaps arise out of a perception the private sector is cheaper to the *government* in the long run, that does not necessarily make the government's efficiency purpose the same as its purpose of promoting reliance on the private sector. Those two purposes are separated by a congressional judgment that should not be second-guessed by the courts. It is a mistake to read backwards from every congressional judgment to its selfish roots, for the reductio ad absurdum of such analysis is to conclude that every law is passed to promote the "purposes" of congressmen, and under the "zone of interest" test only congressmen could sue to enforce them.

[9] If the question is viewed analytically, Local 780 may be characterized as representing part of the pool of available labor. As work shifts from private to public sector, the public sector would draw more heavily on the available labor pool. If we assume equal working conditions and equal labor intensity in the private and public sectors, the only groups even affected would be owners in the private sector and administrators in the public sector. Employees thrown out of work in the private sector would of course be harmed but others filling the new jobs in the public sector would be benefited to an equal degree. Nothing in the statutory language, the legislative history or the regulations even hints at any concern about that allocation of labor opportunities.

This distinction between the interests of employers and the interests of their employees finds its counterpart elsewhere in the law. One obvious example is employee safety rules, for where such rules are concerned the interests of employers and employees are antithetical—the more money the employers spend the safer their employees can be. Under elementary standing principles *Fire Equipment Manufacturers' Association v. Marshall,* 679 F.2d 679, 681 (7th Cir. 1982) refused to permit employers to assert the safety interests of their employees.

Yet even in the more difficult case in which interests of employers and employees seemingly coincide, *American Federation of Government Employees v. Dunn,* 561 F.2d 1310, 1313 (9th Cir. 1977) ruled only employers could contest government bidding procedures "by virtue of their relationship to the government." In short, employees were one step further removed from the procurement process, and that additional step placed them outside the "zone of interest" of the statute in question.[10] This case really follows a fortiori from *Dunn,* because the correlation between the directly-intended benefit to private sector employers and the potential peripheral benefit to their employees is substantially more attenuated here.

Indeed, just this week the unanimous United States Supreme Court opinion in *Block v. Community Nutrition Institute,* 52 U.S.L.W. 4697 (U.S. June 4, 1984) confirmed the validity of the approach and analysis reflected in this opinion and in *Dunn.* In *Block* (as here) suit was brought under the Administrative Procedure Act, though the statute there (unlike the situation here) clearly permitted *some* judicial review of agency action.[11] What is significant about *Block* for current purposes is

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[10] *Dunn* contrasted the interests of disappointed government employees with disappointed private sector contractors, but *not* on the basis they came from different sectors of the economy. Rather it distinguished them on the basis that the employees were further removed from the bidding process than were the private sector contractors.

[11] That really parallels the arguendo assumption made in this opinion (see text at n.4).

that the Court found the plaintiff consumers of milk, though significantly affected by the Secretary of Agriculture's action,[12] had no standing to sue though (or perhaps even because) producers and handlers of milk *could* sue to challenge the Secretary's violations of law. As the Court put it (*id.* at 4698-99):

> But the preclusion issue does not only turn on whether the interests of a particular class like consumers are implicated. Rather, the preclusion issue turns ultimately on whether Congress intended for that class to be relied upon to challenge agency disregard of the law.

And the court ultimately found (*id.* at 4700) the parties "directly affected by the statutory scheme"—the producers and handlers, who "have interests similar to those of consumers"—had to be the sole parties permitted "to challenge unlawful agency action and to ensure that the statute's objectives will not be frustrated." *Block's* parallel to the current case is too obvious to require extended treatment.

Conclusion

Local 780's cause of action is dismissed with prejudice because Local 780 falls outside the "zone of interest" of the Circular. Its summary judgment motion is dismissed as moot.

/s/ MILTON I. SHADUR

Milton I. Shadur
United States District Judge

Date: June 8, 1984

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[12] In fact plaintiffs' arguable standing in *Block* was substantially more persuasive than here, because "the general purpose sections of the Act allude to general consumer interests" (*id.* at 4698), while nothing in the statute or regulations involved here hints at *employee* interests as a subject of concern.

41 U.S.C. § 401

§ 401. Congressional declarations of policy

It is the policy of the Congress to promote economy, efficiency and effectiveness in the procurement of property and services by the executive branch of the Federal Government by—

(1) promoting full and open competition;

(2) establishing policies, procedure, and practices which will provide the Government with property and services of the requisite quality, within the time needed, at the lowest reasonable cost;

(3) promoting the development of simplified uniform procurement processes;

(4) promoting the participation of small business concerns;

(5) supporting the continuing development of a competent, professional work force;

(6) eliminating fraud and waste in the procurement process;

(7) eliminating redundant administrative requirements placed on contractor and Federal procurement officials;

(8) promoting fair dealings and equitable relationships with the private sector;

(9) ensuring that payment is made in a timely manner and only for value received;

(10) requiring to the extent practicable, the use of commercial products to meet the Government's needs;

(11) requiring that personal services are obtained in accordance with applicable personnel procedures and not by contract;

(12) ensuring the development of procurement policies that will accommodate emergencies and wartime as well as peacetime requirements; and

(13) promoting, whenever feasible, the use of specifications which describe needs in terms of functions to be performed or the performance required.

41 U.S.C. § 405

§ 405. Authority and functions of the Administrator

(a) Development of procurement policy; leadership

The Administrator shall provide overall direction of procurement policy and leadership in the development of procurement systems of the executive agencies. To the extent that the Administrator considers appropriate, in carrying out the policies and functions set forth in this chapter, and with due regard for applicable laws and the program activities of the executive agencies, the Administrator may prescribe Government-wide procurement policies which shall be implemented in the single system of Government-wide procurement regulations and shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(b) Government-wide procurement regulations

In any instance in which the Administrator determines that the Department of Defense, the National Aeronautics and Space Administration, and the General Services Administration are unable to agree on or fail to issue Government-wide regulations, procedures and forms in a timely manner, the Administrator may, with in regard for applicable laws and the

program activities of the executive agencies and consistent with the policies and functions set forth in this chapter, prescribe Government-wide regulations, procedures and forms which shall be followed by executive agencies in the procurement of—

(1) property other than real property in being;

(2) services, including research and development; and

(3) construction, alteration, repair, or maintenance of real property.

(c) Noninterference with executive agencies

The authority of the Administrator under this chapter shall not be construed to—

(1) impair or interfere with the determination by executive agencies of their need for, or their use of, specific property, services, or construction, including particular specifications therefor; or

(2) interfere with the determination by executive agencies of specific actions in the award or administration of procurement contracts.

(d) Enumeration of included functions

The functions of the Administrator shall include—

(1) providing leadership and ensuring action by the executive agencies in the establishment, development and maintenance of the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in the development of simplified Government-wide procurement regulations, procedures and forms;

(2) coordinating the development of Government-wide procurement system standards that shall be implemented by the executive agencies in their procurement systems;

(3) providing leadership and coordination in the formulation of the executive branch position on legislation relating to procurement;

(4) providing for a computer-based Federal Procurement Data System which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall collect, develop, and disseminate procurement data;

(5) providing for a Federal Acquisition Institute which shall be located in the General Services Administration (acting as executive agent for the Administrator) and shall—

(A) foster and promote Government-wide career management programs for a professional procurement work force; and

(B) promote and coordinate Government-wide research and studies to improve the procurement process and the laws, policies, methods, regulations, procedures, and forms relating to procurement by the executive agencies;

(6) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(7) developing standard contract forms and contract language in order to reduce the Government's cost of procuring property and services and the private sector's cost of doing business with the Government; and

(8) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

(e) Consultation; assistance of existing executive agencies; advisory committees and interagency groups

In carrying out the functions set forth in subsection (c),[1] the Administrator—

(1) shall consult with the affected executive agencies, including the Small Business Administration;

(2) may, with the concurrence of the heads of affected executive agencies, designate an executive agency or executive agencies to assist in the performance of such functions; and

(3) may establish advisory committees or other interagency groups to assist in providing for the establishment, development, and maintenance of a single system of simplified Government-wide procurement regulations and to assist in the performance of any of the other functions which the Administrator considers appropriate.

(f) Oversights of regulations promulgated by other agencies relating to procurement

The Director of the Office of Management and Budget may deny the promulgation of or rescind any Government-wide regulation or final rule or regulation of any executive agency relating to procurement if the Administrator determines that such rule or regulation is inconsistent with the policies set forth in section 401 of this title or any policies, regulations, or procedures issued pursuant to subsection (a) of this section.

(g) Assignment, delegation, or transfer of functions prohibited

Except as otherwise provided by law, no duties, functions, or responsibilities, other than those expressly assigned by this chapter, shall be assigned, delegated, or transferred to the Administrator.

(h) Automatic data processing and telecommunications equipment; real property procurement; Office of Management and Budget

Nothing in this chapter shall be construed to—

(1) impair or affect the authorities or responsibilities conferred by the Federal Property and Administrative Services Act of 1949 [41 U.S.C.A. § 251 et seq.] with

respect to the procurement of automatic data processing and telecommunications equipment and services or of real property: or

(2) limit the current authorities and responsibilities of the director of the Office of Management and Budget.

(i) Recipients of Federal grants or assistance

(1) With due regard to applicable laws and the program activities of the executive agencies administering Federal programs of grants or assistance, the Administrator may prescribe Government-wide policies, regulations, procedures, and forms which the Administrator considers appropriate and which shall be followed by such executive agencies in providing for the procurement, to the extent required under such programs, of property or services referred to in clauses (1), (2), and (3) of subsection (a) of this section by recipients of Federal grants or assistance under such programs.

(2) Nothing in paragraph (1) shall be construed to—

(A) permit the Administrator to authorize procurement or supply support, either directly or indirectly, to recipients of Federal grants or assistance; or

(B) authorize any action by such recipients contrary to State and local laws, in the case of programs to provide Federal grants or assistance to States and political subdivisions.

5 U.S.C. § 701

§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1822, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 702

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an

official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 704

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

5 U.S.C. § 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law,

interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C. 20503

March 29, 1979

CIRCULAR NO. A-76
Revised
Transmittal Memorandum No. 4

TO THE HEADS OF EXECUTIVE
DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government

Transmitted herewith is a revision of Office of Management and Budget Circular A-76, which replaces Transmittal Memorandum No. 1, dated August 30, 1967, Transmittal Memorandum No. 2, dated October 18, 1976, and Transmittal Memorandum No. 3, dated June 13, 1977.

The revised Circular (1) reaffirms the Government's general policy of reliance on the private sector for goods and services, while recognizing that (2) certain functions are inherently governmental in nature and must be performed by Government personnel, and (3) relative cost must be given appropriate consideration in decisions between in-house performance and reliance on private commercial sources. The balanced approach in this revised Circular is designed to achieve consistent policy implementation in all agencies, equitable treatment of all parties, and improved economy and efficiency in providing goods and performing services needed by the Government.

To support the increased emphasis on relative economy of Government and contract performance, a comprehensive Cost Comparison Handbook is provided as a supplement to the Circular. This Handbook is to be used by all agencies in

conducting comparative cost analyses. The Handbook provides instructions for determining the total cost to Government for each alternative and will provide a more accurate basis for cost-based decisions.

This revision of Circular A-76 is the result of an extensive review of the Circular and its implementation by executive agencies, and careful consideration of all comments submitted on the draft revision that was published in August 1978. Many of those comments were accommodated through clarification and refinement of the draft. Supplementary guidance on special subjects will be developed as needed.

Application to R&D Activities

Some concern was expressed over the potential impact of the application of this Circular to Government R&D activities. While agencies with a need for in-house R&D capability can consider a "core capability" in this area as a "governmental function," additional guidance is needed to ensure some consistency in determining and justifying the size of that core capability and applying the Circular to R&D requirements, in excess of that level of capacity.

An interagency committee jointly sponsored by the Office of Federal Procurement Policy and the Office of Science and Technology Policy, has been established under the Federal Coordinating Council for Science, Engineering, and Technology, to study these issues and recommend guidelines for appropriate and uniform agency implementation. Supplemental guidance addressing R&D activities will then be developed and, after public review and comment, be issued as an amendment to the Circular. In the interim, compliance with this Circular and the periodic review of inventoried R&D activities are to be deferred for one year pending completion of the study, except for new starts and expansions, as defined in the Circular. Additional guidance will be provided on determining justified "core capability" and applying the policy to other R&D requirements to assure that essential in-house capability is maintained, and that the Government and taxpayers' interests are properly considered in contract versus in-house decisions.

Government-Owned Contractor-Operated Activities

Government-owned, contractor-operated (GOCO) activities were excluded from prior issuances of the Circular. A comprehensive review of all GOCO activities is necessary to determine whether they can be completely treated under the terms of this Circular. In the interim, this Circular is to be applied only to new starts and expansions of Government-owned equipment and facilities.

Personnel Ceilings

The relationship between Circular A-76 and agency personnel ceilings was reviewed in some detail and clarified in the Circular. While it is clearly specified that agencies will not use the Circular to contract out solely to meet personnel ceilings, it is equally clear that agencies will contract out when justified under the Circular regardless of the relationship between personnel levels and authorized ceilings. Conversely, contracts for activities that are shown to be justified for in-house performance will be terminated as quickly as in-house capability can be established; when the additional spaces required cannot be accommodated within the agency's personnel ceiling, a request for adjustment will be submitted to OMB in conjunction with the annual budget review process.

The Office of Management and Budget will monitor agency implementation of this revised Circular, providing guidance and interpretations as required. Further revisions and supplements will be issued as necessary in the future to achieve the policy objectives.

/s/ LESTER A. FETTIG

Lester A. Fettig
Administrator for Federal
Procurement Policy

/s/ JAMES T. MCINTYRE, JR.

James T. McIntyre, Jr.
Director

EXECUTIVE OFFICE OF THE PRESIDENT
Office of Management and Budget
Washington, D.C. 20503

March 29, 1979

CIRCULAR NO. A-76
Revised

TO THE HEADS OF EXECUTIVE
DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Policies for Acquiring Commercial or Industrial Products and Services Needed by the Government

1. *Purpose.* This Circular establishes the policies and procedures used to determine whether needed commercial or industrial type work should be done by contract with private sources or in-house using Government facilities and personnel. This Circular replaces OMB Circular No. A-76, dated August 30, 1967, and all subsequent amendments.

2. *Background.* In a democratic free enterprise economic system, the Government should not compete with its citizens. The private enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on competitive private enterprise to supply the products and services it needs.

This policy has been expressed in Bureau of the Budget Bulletins issued in 1955, 1957, and 1960. In 1966, Circular No. A-76 was issued and, for the first time, prescribed the policy and implementing guidelines in a permanent directive. The Circular was revised in 1967, by Transmittal Memorandum No. 1, to clarify some provisions and to lessen the burden of work by the agencies in implementation. Transmittal Memoradum No. 2 was issued in 1976, providing additional guidance

on cost comparisons and prescribing standard cost factors for Federal employee retirement and insurance benefits.

In 1977, a comprehensive review of the Circular and its implementation was initiated. Transmittal Memorandum No. 3 was issued on June 13, 1977, announcing the review and temporarily reducing the Government retirement cost factor. This revision is the result of that review and careful consideration of comments from all interested parties.

3. *Responsibility.* Each agency head has the responsibility to ensure that the provisions of this Circular are followed. This Circular provides administrative direction to heads of agencies and does not establish, and shall not be construed to create, any substantive or procedural basis for any person to challenge any agency action or inaction on the basis that such action was not in accordance with this Circular, except as specifically set forth in Section 11 below.

4. *Policy.* This policy builds on three equally valid policy precepts:

a. *Rely on the Private Sector.* The Government's business is not to be in business. Where private sources are available, they should be looked to first to provide the commercial or industrial goods and services needed by the Government to act on the public's behalf.

b. *Retain Certain Governmental Functions In-House.* Certain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance by Federal employees.

c. *Aim for Economy; Cost Comparisons.* When private performance is feasible and no overriding factors require in-house performance, the American people deserve and expect the most economical performance and, therefore, rigorous comparison of contract costs versus in-house costs should be used, when appropriate, to decide how the work will be done.

5. *Definitions.* For the purposes of this Circular:

a. A *"Government commercial or industrial activity"* is one which is operated and managed by a Federal executive agency

and which provides a product or service that could be obtained from a private source. A representative, but not comprehensive, listing of such activities is provided in Attachment A. An activity can be identified with an organization or a type of work, but must be (1) separable from other functions so as to be suitable for performance either in-house or by contract; and (2) a regularly needed activity of an operational nature, not a one-time activity of short duration associated with support of a particular project.

b. *An "expansion"* is the modernization, replacement, upgrade, or enlargement of a Government commercial or industrial activity involving additional capital investment of $100,000 or more, or increasing annual operating costs by $200,000 or more; provided, the increase exceeds 20% of the total investment or annual operating cost. A consolidation of two or more activities is not an "expansion" unless the proposed total capital investment or operating cost exceeds the total from the individual activities by the amount of the threshold. An expansion which increases either capital investment or annual operating cost by 100% or more is a "new start."

c. *A "conversion"* is the transfer of work from a Government commerical or industrial activity to performance by a private commercial source under contract.

d. *A "new start"* is a newly-established Government commercial or industrial activity, including a transfer of work from contract to in-house performance. Also included is any expansion which would increase capital investment or annual operating cost by 100% or more.

e. *A "private commercial source"* is a private business, university, or other non-Federal activity, located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico, which provides a commercial or industrial product or service required by Government agencies.

f. *A "Governmental function"* is a function which must be performed in-house due to a special relationship in executing

governmental responisbilities. Such governmental functions can fall into several categories:

(1) *Discretionary application of Government authority*, as in investigations, prosecutions and other judicial functions; in management of Government programs requiring value judgments, as in directing the national defense; management and direction of the Armed Services; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers and other natural resources; direction of intelligence and counter-intelligence operations; and regulation of industry and commerce, including food and drugs.

(2) *Monetary transactions and entitlements*, as in Government benefit programs; tax collection and revenue disbursements by the Government; control of the public treasury, accounts, and money supply; and the administration of public trusts.

(3) *In-house core capabilities* in the area of research, development, and testing, needed for technical analysis and evaluation and technology base management and maintenance. However, requirements for such services beyond the core capability which has been established and justified by the agency are not considered governmental functions.

6. *Scope.*

a. No executive agency will engage in or contract for commercial or industrial activities except in accordance with the provisions of this Circular, or as otherwise provided by law, including, for example, Title 44 of the U.S. Code.

b. The implementation provisions of this Circular do not apply to governmental functions as defined in paragraph 5(f). These functions must be performed in-house by Government personnel.

c. This Circular applies to the need for Government ownership in any "new start" or "expansion" of a Government-owned, contractor-operated (GOCO) facility.

d. Additional provisions are as follows:

(1) This Circular does not provide authority to enter into contracts. Guidelines governing contracts for goods and services are set forth in applicable acquisition regulations.

(2) This Circular will not be used as authority to enter into contracts which establish a situation tantamount to an employer-employee relationship between the Government and individual contract personnel. Additional guidance on this subject is provided in the Federal Personnel Manual issued by the Office of Personnel Management.

(3) This Circular will not be used to justify a conversion to contract solely to meet personnel ceilings or to avoid salary limitations. When in-house performance of a "new start" is justified under this Circular but cannot be accommodated within agency personnel ceilings, an appeal for necessary adjustment to implement this Circular agency-wide should be made to OMB in connection with the annual budget review process.

(4) Major system acquisitions are governed by the provisions of OMB Circular No. A-109, "Major System Acquisitions." Reliance on the private sector is one of the general policies contained in Circular A-109 to ensure competitive consideration of all alternatives before making a decision as to the best method of satisfying an agency mission need.

(5) This Circular does not apply to consulting services of a purely advisory nature relating to the governmental functions of agency administration and management and program management. Assistance in the management area may be provided either by Government staff organizations or from private sources, as deemed appropriate by executive agencies, in accordance with executive branch guidance on the use of consulting services.

(6) This Circular applies to printing and binding only in those agencies or departments which are exempted by law from the provisions of Title 44 of the U.S. Code.

(7) This Circular should not be applied when it would be contrary to law or inconsistent with the terms of any treaty or international agreement.

7. *Use of Products and Services from Other Federal Agencies.*

a. Excess property and services available from other Federal agencies should be used in preference to new starts or contracts, unless the needed product or service can be obtained more economically in the private sector. This is consistent with the Federal Property and Administrative Services Act of 1949 and related regulations.

b. When a commercial or industrial activity operated by an agency primarily to meet its own needs has excess capacity, that capacity can be used to provide products or services to other agencies.

(1) If a formal program is established for managing excess capacity, such as the ADP sharing program operated by GSA, capacity that has been reported as excess can be used by other agencies with no further justification. In the absence of a formal program and report of excess capacity, another agency's use of a Government activity must be justified in accordance with paragraph 8 of this Circular. When the cost justification is used, the agency requiring the product or service will solicit competitive bids or proposals to establish commercial costs, and award a contract when more economical. The prospective providing agency will prepare the Government cost estimate, in accordance with this Circular, for comparison with the commercial cost.

(2) It is not intended that agencies create or expand capacity for the purpose of providing commercially available products or services to other agencies. When the

performing agency's own requirements increase, capacity used to support other agencies is no longer excess and should be used in preference to acquisition of additional capability. Consequently, agencies should not expand a commercial or industrial activity which is providing products or services to other agencies. The user agency (or agencies) should be informed, with sufficient notice to arrange alternative sources, that the support will be terminated unless exceptional circumstances prevent that agency from finding a new source.

c. In some cases, a commercial or industrial activity is operated for the primary purpose of providing a product or service to other agencies, such as the Federal Data Processing Centers or the Office of Personnel Management training centers. All such activities must be reviewed under this Circular to determine whether continued Government operation is justified. The review should be made at the earliest possible date, but under no circumstances later than October 1, 1981. Prior to that review, agencies may use the products and service available without further justification. When continued Government operation of the activity is approved, agencies may use the products or services provided, up to the level of capability approved, with no further justification. When expansion of such an activity is proposed, the justification for approval under this Circular can be based on the entire workload, including work for other agencies.

8. *Government Operation of a Commercial or Industrial Activity.* Government operation of a commercial or industrial activity may be authorized under one of the following conditions.

a. *No Satisfactory Commercial Source Available.*

(1) A Government commercial or industrial activity can be authorized without a comparative cost analysis when it is demonstrated that:

(a) There is no private commercial source capable of providing the product or service that is needed; or

(b) Use of a private commercial source would cause an unacceptable delay or disruption of an essential agency program.

(2) Before concluding that there is no private commercial source capable of providing the needed product or service, the agency must make all reasonable efforts to identify available sources.

(a) As a minimum, the agency must place at least three notices of the requirement in the *Commerce Business Daily* over a 90-day period. In the case of urgent requirements, publication in the *Commerce Business Daily* can be reduced to two notices over a 30-day period.

(b) Agencies' efforts to find satisfactory commercial sources, especially small and minority-owned businesses, should include obtaining assistance from the General Services Administration, Small Business Administration, and the Domestic and International Business Administration in the Department of Commerce.

(3) A conclusion that use of a commercial source would not be satisfactory because it would cause an unacceptable delay or disrupt an agency program requires a specific documented explanation.

(a) Delay or disruption must be spelled out specifically in terms of cost, time and performance measures.

(b) Disruption must be shown to be of a lasting or unacceptable nature. Transitory disruption caused by conversions are not sufficient grounds.

(c) In all cases, specific explanations must be documented. If it is known that the function has been performed by contract elsewhere or at another time, the justification must specify why circumstances are substantially different.

(d) The fact that an activity involves a classified program, or is part of an agency's basic mission, or that there is a possibility of a strike by contract employees is not an adequate justification for in-house performance of that activity. Urgency by itself is not an adequate reason for starting or continuing a Government commercial or industrial activity. It must be shown that commercial sources are not able and the Government is able to provide the product or service when needed.

b. *National Defense.*

(1) A Government commercial or industrial activity, operated by military personnel, may be justified when:

(a) The activity or military personnel assigned are utilized in or subject to deployment in a direct combat support role;

(b) The activity is essential for training in those skills which are exclusively military in nature; or

(c) The activity is needed to provide appropriate work assignments for career progression or a rotation base for overseas assignments.

(2) A Government commercial or industrial activity providing depot or intermediate level maintenance may be justified in accordance with criteria approved by the Secretary of Defense to ensure a ready and controlled source of technical competence and resources necessary to meet military contingencies. These criteria will limit the extent of in-house capability and capacity within the military departments for depot and intermediate maintenance support of mission-essential equipment to the minimum necessary to accomplish that objective. Justification under these criteria will require a detailed explanation, on a case-by-case basis, why the needed capability cannot be supplied by:

(a) A private commercial source; or

(b) Contract operation of Government-owned facilities.

Such justification must be approved at the military department assistant secretary level or equivalent in the defense agencies.

c. *Higher Cost.* A Government commercial or industrial activity may be authorized if a comparative cost analysis, prepared in accordance with paragraph 9 of this Circular, indicates that the Government can provide or is providing a product or service at a lower total cost than if it were obtained from a private commercial source.

9. *Cost Comparisons.* A decision for in-house performance based on economy must be supported by a comparative cost analysis prepared in accordance with this Circular and the supplementing Cost Comparison Handbook.

a. *Common Ground Rules.*

(1) Both Government and commercial cost figures must be based on the same scope of work and the same level of performance. This requires the preparation of a sufficiently precise work statement with performance standards that can be monitored for either mode of performance.

(2) Standard cost factors will be used as prescribed by the Cost Comparison Handbook and as supplemented by agencies for particular operations. It will be incumbent on each agency to defend any variations in costing from one case to another.

(3) Cost comparisons are to be aimed at full cost, to the maximum extent practical in all cases. All significant Government costs (including allocation of overhead and indirect costs) must be considered, both for direct Government performance and for administration of a contract.

(4) In the solicitation of bids or offers from contractors for workloads that are of a continuing nature, unless otherwise inappropriate, solicitations should provide

for prepriced options or renewal options for the out-years. These measures will guard against "buy-in" pricing on the part of contractors. While recompetition also guards against "buy-ins," the use of prepriced or renewal options provides certain advantages such as continuity of operation, the possibility of lower contract prices when the contractor is required to provide equipment or facilities, and reduced turbulence and disruption.

(5) Ordinarily, agencies should not incur the delay and expense of conducting cost comparison studies to justify a Government commercial or industrial activity for products or services estimated to be less than $100,000 in annual operating costs. Activities below this threshold should be performed by contract unless in-house performance is justified in accordance with paragraph 8.a. or b. However, if there is reason to believe that inadequate competition or other factors are causing commercial prices to be unreasonable, a cost comparison study may be conducted. Reasonable efforts should first be made to obtain satisfactory prices from existing commercial sources and to develop other competitive commercial sources.

(6) The cost comparison will use a rate of 10% per annum as the opportunity cost of capital investments and of the net proceeds from the potential sale of capital assets, as prescribed in the Cost Comparison Handbook.

b. *Calculating Contract Costs.*

(1) The contract cost figure must be based on a binding firm bid or proposal, solicited in accordance with pertinent acquisition regulations. Bidders or offerors must be told that an in-house cost estimate is being developed and that a contract may or may not result, depending on the comparative cost of the alternatives.

(2) The factor to be used for the Government's cost of administering contracts, in addition to other costs of using contract performance as specified in the Handbook, is 4% of the contract price or expected cost.

c. *Calculating Costs of Government Operation.*

(1) Each agency should assure that Government operations are organized and staffed for the most efficient performance. To the extent practicable and in accordance with agency manpower and personnel regulations, agencies should precede reviews under this Circular with internal management reviews and reorganizations for accomplishing the work more efficiently, when feasible.

(2) The Government cost factor to be used for Federal employee retirement benefits, based on a dynamic normal cost projection for the Civil Service Retirement Fund, is 20.4%.

(3) The Government cost factor to be used for Federal employee insurance (life and health) benefits, based on actual cost, is 3.7%.

(4) The Government cost factor to be used for Federal employee workmen's compensation, bonuses and awards, and unemployment programs is 1.9%.

d. An existing in-house activity will not be converted to contract performance on the basis of economy unless it will result in savings of at least 10% of the estimated Government personnel costs for the period of the comparative analysis.

e. A "new start" will not be approved on the basis of economy unless it will result in savings compared to contract performance at least equal to 10% of Government personnel costs, plus 25% of the cost of ownership of equipment and facilities, for the period of the comparative analysis.

f. All cost comparisons must be reviewed by an activity independent of the cost analysis preparation to ensure conformance to the instructions in the Cost Comparison Handbook.

10. *Administering the Policy.*

a. *Implementation.*

(1) Each agency will designate an official at the assistant secretary or equivalent level, and officials at

subordinate contact points for major components, to have overall responsibility for implementation of this Circular within the agency.

(2) Each agency will establish one or more offices as central points of contact to maintain cognizance of specific implementation actions. These offices will have access to all decisio documents and data pertinent to actions taken under the Circular and will respond, in a timely manner, to all requests concerning inventories, schedules, reviews, and results of reviews. In considering requests which include information supplied by contractors or prospective contractors, agencies will be guided by OFPP Policy Letter No. 78-3, "Requests for Disclosure of Contractor-Supplied Information Obtained in the Course of a Procurement."

(3) Within 90 days after the date of issuance, each agency will promulgate this Circular, with the minimum necessary internal instructions, identifying the designated official and the central and subordinate contact points. When issued, copies of the internal instructions will be forwarded to OMB's Office of Federal Procurement Policy for review. Copies of subsequent changes will also be forwarded for review.

(4) Each agency will recognize that work for the Federal Government may be performed by use of military personnel, civilian employees, and contract services, and that past experience demonstrates that all three methods have been responsive nd dependable in performing sensitive and important work.

(5) Each agency will ensure that contracts awarded as a result of reviews under Circular A-76:

(a) Contain all applicable clauses and provisions related to equal employment opportunities, veterans' preference, and minimum wages and fringe benefits, including implementation of OFPP Policy Letter No. 78-2, dated March 29, 1978, relating to "wage busting;"

(b) Include a provision, consistent with Government post employment conflict of interest standards, that the contractor will give Federal employees, displaced as a result of the conversion to contract performance, the right of first refusal for employment openings on the contract in positions for which they are qualified;

(c) Are awarded to a responsible and responsive bidder or offeror, as required by applicable acquisition regulations; and

(d) Are administered and monitored to achieve proper performance, using appropriate contractual remedies any time performance is less than satisfactory.

(6) Each agency will exert maximum effort to find suitable employment for any displaced Federal employees, including:

(a) Giving them priority consideration for suitable positions with the Government;

(b) Paying reasonable costs for training and relocation when these will contribute directly to placement;

(c) Arranging for gradual transition when conversions are made to provide greater opportunity for attrition and placement; and

(d) Coordinating with the Department of Labor and other agencies to obtain private sector employment for separated workers.

(7) Each agency will provide for alterations to the mode of performance to be timed in consonance with, and adjusted for, the budget process to the extent required and consistent with the firm bid cost study approach.

b. *Inventories.* Each agency will immediately compile a complete inventory of all commercial and industrial activities subject to this Circular.

(1) Agencies will prepare and maintain a complete inventory of all individual commercial or industrial activities (as defined in paragraph 5.a.), which they operate. In addition to general descriptive information, the inventory should include for each activity: the amount of the Government's capital investment, the annual cost of operation, the date the activity was last reviewed, and the basis on which the activity is being continued under this Circular. The inventory will be updated at least annually to reflect the results of reviews as conducted.

(2) Agencies will also prepare and maintain an inventory of all contracts in excess of $100,000 annually, except those awarded under a duly authorized set aside program, for services which the agency determines could reasonably be performed in-house, including any activities that have been converted from in-house to contract performance. In addition to general descriptive information, the inventory will include: the contract number, name of the contractor, contract period, period of any options, and the total contract price or estimated cost. Inventory updates will reflect exercise of options and the termination and award of contracts.

c. *Reviews.* Agencies will prepare a detailed schedule for the review of each commercial or industrial activity and contract in the inventory to determine if the existing performance, in-house or contract, continues to be in accordance with the policy and guidelines of this Circular. The flow chart provided as Attachment B demonstrates the sequence of actions required for proper implementation of the Circular.

(1) The schedule for review of in-house commercial and industrial activities will provide for review of all activities during the three-year period following issuance of this revised Circular. Consideration should be given first to criteria that do not concern cost. Unless continuation is justified under paragraphs 8.a. or b., a cost comparison must be conducted to determine the relative cost of Government and private performance.

(2) The schedule for review of contracts will show the date that each contract (including options) will expire, and the date that the requirement will be reviewed to determine if contract performance is to be continued. The agency will review the contract cost and determine whether it is likely that the work can be performed in-house at a cost that is less than contract performance by 10% of Government personnel costs plus 25% of the cost of ownership of equipment and facilities. When this is determined to be likely, a cost comparison will be conducted.

(3) Both schedules will be completed and provided to the Office of Federal Procurement Policy, OMB, within 120 days of the date of issuance of this Circular. These schedules will be made available by the agency to all potentially affected employees and their representatives, and published for the information of contractors.

(4) Reviews will be conducted in accordance with the schedules, unless it is determined that a change in the schedule will be in the best interest of the Government. In such cases, after approval by the agency head or his designee, the schedule can be revised with 60 days notice to all affected parties.

(5) After the initial review, activities approved for continuation will be reviewed again at least once every five years. When it is determined by the agency head or his designee that the circumstances which supported the initial approval are not subject to change, subsequent reviews may be waived. These activities will be retained in the inventory, however, and so identified. A copy of the justification and the waiver will be made available to all interested parties upon request to the agency contact point.

(6)*

* There is no paragraph in the Circular.

(7) When the number of commercial and industrial activities and the number of covered contracts is so great that reviews cannot be completed in the prescribed time period, the agency may request approval from the Office of Federal Procurement Policy, OMB, to schedule the reviews over a longer period.

d. *New Starts.*

(1) A new start should not be initiated by an executive agency unless the justification for establishing the activity under the provisions of this Circular has been reviewed and approved by a senior official of the agency. A new start which involves a capital investment or annual costs of $500,000 or more must be approved by the agency head or by an official at the assistant secretary or equivalent level.

(2) The actions to be taken under this Circular should normally be completed before the agency's budget request is submitted to OMB. Data in support of such budget requests will be submitted in accordance with OMB Circular No. A-11. In the case of a proposed new start involving a major capital investment where the item to be acquired requires a long lead time (e.g., ADP system, building), approval of budget resources will not constitute OMB approval of the method of meeting the agency need. A final determination to initiate the new start or to rely on a private commercial source, within the resources approved, will be made in accordance with this Circular and other applicable policies, prior to any commitment to a particular acquisition strategy.

(3) When Government ownership of facilities is necessary, the possiblity of contract operation must be considered before in-house performance is approved as a new start. If justification for Government operation is dependent on relative cost, the comparative cost analysis may be delayed to accommodate the lead time necessary for acquiring the facilities.

(4) When in-house performance to meet a new requirement is not feasible, or when contract performance would be under an authorized set-aside program, a contract can be awarded without conducting a comparative cost analysis.

e. *Set-Aside Programs.*

(1) It is the general policy of the Government, as expressed in the Small Business Act, to ensure that small businesses, including those owned and managed by disadvantaged persons, receive a fair share of Government contract awards.

(2) Consequently, contracts awarded under authorized set-aside programs will not be reviewed for possible in-house performance. Additionally, new requirements which would be suitable for award under a set-aside program should be satisfied by such a contract without a comparative cost analysis.

(3) On the other hand, in-house activities (in excess of $100,000 annually) will not be considered for performance under a set-aside contract except when the conversion is justified by a comparative cost analysis.

11. *Appeals.*

a. Each agency will establish a procedure for an informal administrative review of determinations made under this Circular. This procedure will only be used to resolve questions of the determination between contract and in-house performance, and will not apply to questions concerning award to one contractor in preference to another contractor. Upon written request from a directly affected party raising a specific objection, the appeals procedure will provide for:

(1) An independent, objective review of the initial determination and the rationale upon which the decision was based.

(2) An expeditious determination, within 30 days, made by an official at the same or higher level than the official who approved the original decision.

b. The appeals procedure is to provide an administrative safeguard to assure that agency decisions are fair, equitable, and in accordance with established policy. This procedure does not authorize an appeal outside the agency or a judicial review.

c. Since the appeal procedure is intended to protect the rights of all affected parties—Federal employees and their representative organizations, contractors and potential contractors, and contract employees and their representatives—the procedure and agency determinations may not be subject to negotiation, arbitration, or agreements with any one of those parties. Agency decisions are final.

d. Agency appeal procedures, when issued, will be submitted to OFPP for review pursuant to paragraph 10.a.(3).

12. *Effective Date.*

This Circular is effective May 1, 1979, but need not be applied to studies in process where a solicitation for contract bids or proposals was issued prior to the effective date.

Questions or inquiries about this Circular or its implementation should be addressed to the Office of Federal Procurement Policy, OMB, telephone number (202) 395-7207.

/s/ LESTER A. FETTIG
Lester A. Fettig
Administrator for Federal
Procurement Policy

/s/ JAMES T. MCINTYRE, JR.
James T. McIntyre, Jr.
Director